

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 330 of 1997

with

SPECIAL CIVIL APPLICATIONS NO.331, 63, 1088, 1707, 1199,
1705, 1203, 1929, 1854 AND 1566 ALL OF 1997

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? yes

2. To be referred to the Reporter or not? yes @ t
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3. Whether Their Lordships wish to see the fair copy
of the judgement? no

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?no

5. Whether it is to be circulated to the Civil Judge?
no

O G GOSWAMI

Versus

DISTRICT DEVELOPMENT OFFICER

Appearance:

Special Civil Applications 330 and 331 of 1997

Mr.J.R.Nanavati, ld.Counsel with Mr.A.R.Thakkar for the petitioners.

Mr.V.H.Patel for respondent no.1, Mr.H.L.Jani AGP for no.3 and no.2 served.

Special Civil Applications 1705/97, 1707/97 and 1199/97

Mr.P.B.Majmudar for the petitioners

Mr.R.A.Mishra for respondent no.2 in 1705/97 & 1199/97

Mr.H.S.Munshaw for respondent no.2 in SCA 1707/97

Mr.H.L.Jani AGP for respondent no.1

Special Civil Applications 63/97 & 1088/97

Mr.H.M.Parikh for the petitioners

Mr.Yayana V.Panchal & Mr.H.S.Munsha resp. for respondent no.1.

Mr.H.L.Jani, AGP for respondent no.3.

Respondent no.2 served.

Special Civil Applications No.1203/97, 1854/97 and 1929/97:

Mr.B.S.Supehia for Ms.Nayana V.Panchal for the petitioners

Mr.H.L.Jani, AGP for respndent no.1

Mr.Premal R.Joshi for respondents no.2 & 3 in 1929/97

Mr.V.H.Patel for respondent no.3 in SCA No.1203/97

Rest served.

Special Civil Application No.1566 of 1997

Mr.P.B.Majmudar, L.A. for the petitioner

Mr.H.L.Jani AGP for No.1

Mr.H.S.Munshaw for respondent no.2.

CORAM : MR.JUSTICE N.J.PANDYA

Date of decision: 19/06/97

ORAL JUDGEMENT

In all these matters, a common question is involved as to the requirement of passing of departmental examination. The petitioners in all the matters belong to Panchayat service of the State Panchayat Cadre and in different Districts of the State respective District Panchayats had appointed them in the post of senior Clerk

before the crucial date involved in the controversy. The crucial date is 9-7-1976. On that date, the State of Gujarat, in its Panchayat, Housing and Urban Development Department by Notification dated 9-7-1976 in exercise of power under Sec.323 read with sub-Sec.3 of Sec.203 of the Gujarat Panchayat Act, 1961 came out with rules bearing name "Panchayat Service Senior Clerk and Haval Karkun Qualifying Examination Rules 1976 (hereinafter referred to as "Rules"). They came to be amended subsequently by another Notification dated 24-9-1990 and its nomenclature came to be changed to "Gujarat Panchayat Service Senior Clerk Deputy Chitnis, Deputy Mamlatdar, Assistant Taluka Development Officer, Deputy Taluka Development Officer and Taluka Panchayat Officer. What was originally meant for Senior Clerks and Aval Karkuns, other posts of the same category having been created in the meantime, or probably thought fit to be included within the amplitude of the Rule, was thus specifically mentioned by way of amendment.

2. As all the matters are taken up for hearing together treating Special Civil Application No.330 of 1997n to be the main petition, reference to various pages, annexures etc. is made on the basis of its position in the said main petition. The rules referred to above are to be found at page 24 onwards and the amendment by way of Annexure C is at page 33.

3. It is an accepted position that in the Rules at page 24, there is no provision at all to the effect that they are made applicable with retrospective effect. They provide for additional requirement of passing of departmental examination and for this purpose, two Rules are required to be considered. The first one is Rule 3 and the second is Rule 4. Rule 3 provides for passing of Departmental Examination by direct recruits. They are required to pass the Departmental Examination during the probation period of 2 years from the date of joining service. Rule 4 relates to superior panchayat service and passing of Departmental examination by them for being considered to be eligible for appointment to higher posts.

4. The aforesaid Rule 4 need not be gone into further. It has been referred to because there also there is a reference to departmental examination. However, as noted above, the examination is one additional eligibility criteria for being considered to higher posts and that is not the event involved in any of these petitions. What is involved in the petition is

that the petitioners in all the matters, according to the respondents and particularly the respective District Panchayats have failed to pass departmental examination as direct recruits and therefore, their services are sought to be terminated in accordance with Rules 5 & 6 of the said Rules. This, no doubt, is clearly the position in sub-rule (1) of Rule 6 and about this provision there is no dispute at all. What is in dispute is whether the said Rule would be applicable to the petitioners. They are raising this dispute because admittedly all of them have joined the service in the respective of District Panchayats as Senior Clerk prior to the aforesaid date namely 9th July 1976. No doubt, different petitioners have joined in service on different dates but all of them have definitely joined before 9-7-1976. The petitioner of Special Civil Application No.330 of 1997 has joined on 27-6-1967. The remaining petitioners have joined on different dates and their period is within the range of 1958 and 1972. The petitioner of petition No.63 of 1997 was appointed in the year 1958. The respective petitioners have joined on different dates prior to 9th of July 1976.

5. In order to understand the action taken by the respective appointing authorities under the aforesaid provisions of Rule 5 and 6, first we will have to go to Rule 3, which provides for the initial requirement of passing of Departmental Examination. It reads as under:

Rule 3: Passing of Departmental Examination by
 direct recruits: Subject to the provisions of
 these rules, all direct recruits shall be
 required to pass the Departmental Examination
 during the probation period of two years from the
 date of joining service;

Provided that if the period of passing the
 Departmental Examination expires before the date
 of the examination in the case of candidate who
 has a last chance at the said examination the
 said period shall, in the case of such candidate,
 be deemed to have been extended upto the date on
 the declaration of the result of the Departmental
 examination so held:

Provided further that if a direct recruit fails
 to pass the Departmental Examination within the
 period specified as aforesaid such period shall,
 if in the opinion, of the Government his service
 be otherwise satisfactory, be extended to such
 period not exceeding three years (four years in

the case of a direct recruit belonging to the Scheduled Caste or the Scheduled Tribe) in the aggregate as may be necessary to enable him to pass the examination in not more than three chances (four chances in the case of direct recruit belonging to the Scheduled Caste or Scheduled Tribe) in all."

After the Rules were promulgated, the first examination that came to be held was in the year 1991. Two examinations were held in the year 1992 and one examination was held in the year 1996. That is how, it could certainly be said by the respondent authorities that 4 examinations on different dates during different years were held. In spite of this, when the authorities found that the petitioners have either not appeared or having appeared, they have not cleared the examination within the prescribed period and specified number of chances, power under Rules 5 & 6 were invoked and the impugned orders of termination like Annexure A page 23 came to be passed against all the petitioners on different dates. Challenging this order, they have filed these petitions.

6. Before these petitions were filed some event happened in connections with this very examination are required to be noted. They approached this Court by way of Special Civil Application No.5841 of 1993 through their Mahamandal. A Learned Judge of this Court Justice R.K.Abichandani by his order dated 5-8-1993 page 51, noted the fact that the Mandal would make a representation to the State Government and on it being considered by the State Government, the petition should not be gone into on merit. The thrust of the representation was that most of the affected members of the Association having joined prior to the date of Rules namely 9th July 1976 and having crossed the age of 45 years, the requirement of their passing the examination should not be insisted upon and they should be exempted from the same. The Government did not agree to it. Some of the persons affected therefore, filed individual petitions. Three such petitions came to be dealt with by Justice M.R.Calla. These petitions are SCA Nos.10699, 10818 and 10887 all of 1994. There again the thrust was exemption to be granted to the candidates who have crossed the age of 45 years. The learned Judge by his order dated 14-9-1994 has granted that by way of interim relief. A copy of this order is at Annexure K pages 99 to 102.

7. In the meantime, leaving aside the controversy of

exemption on account of crossing the age of 45 years and leaving aside for the time being the controversy of applicability or otherwise of the Rule, it is required to be noted that some of the petitioners and like them many such candidates did appear at different examinations. Those who succeeded within the specified time and prescribed number of chances, obviously, are not adversely affected. However, those who did not succeed, faced termination order and they also have come before the Court by way of these petitions.

8. Generally speaking, as noted above, all these petitioners have entered the Panchayat service of different District Panchayat starting with the year 1958 in the case of Mr.B.P.Bandari, the petitioner of Petition No.63 of 1997 to 1972, petitioner of petition No.1707 of 1997. So far as the passing of time is concerned, therefore, counting from the year 1958 after 18 years, candidates like Mr.Bandari are required to appear at the examination and at the other end appointees of the year 1972 like petitioners Shri Panchal after 4 years of their entering into service they are required to appear at the examination. If we look at the Rule quoted above, the Rule itself provides for clearing of the examination within the period of probation which is of 2 years. If recruitment is made, under these rules, after 9-7-1976, the probation period being for 2 years during that period as per Rule 3, the examination had to be cleared. Of necessity, this could not happen because the first examination held under the Rules came to be held in the year 1991 only. There are two provisos automatically extending the period till the first examination is held and the result is declared.

9. One can, therefore, understand the situation required to be considered in connection with the employees who have entered the Panchayat Service after promulgation of these Rules. In their case, complete scheme is provided in the Rule itself and no anomaly is likely to be created in relation to the specified time and prescribed number of chances.

10. However, when reference to the requirement of the examination to be cleared within 2 years from the date of appointment i.e before the end of probation period of 2 years, if the examination is held within that period as contemplated by the Rule itself, the entire scheme of the Rule would have operated without recourse being had to any of the provisos. Yet, for the candidates who have entered the service prior to the promulgation of Rules, the Rule would create anomaly when the probation period

referred therein is taken into consideration.

11. Taking first the case of Mr. Bandari, the oldest case, before promulgation of the Rules, not only he was confirmed but he was promoted in the year 1969. In case of other petitioners, no doubt, they have been promoted after the promulgation of Rules but definitely before the probation period, as per the rules was over.

12. When Rule 3, whereunder the examination is being held, itself refers to the requirement of clearance of examination during the probation period, which by deeming fiction may be continued for the examination purpose by the said two provisoes, obviously, the Rules are prospective and not retrospective. If at all there was any contemplation in the mind of the Rule making authority because of the candidates who have already entered the service prior to promulgation of Rules, there would have been special provision in that regard without any reference to being made requiring them to clear examination within the probation period. Obviously, all those candidates who had joined the service prior to the promulgation of rules, in all probability would have completed probation period especially those who were taken into service prior to 9-7-1974. This inference is made on the basis of the provision of probation period of 2 years in main matter i.e. SCA No.330 of 1997 and in other matters also reply affidavit has been filed by the respective DDO. The contention raised therein is only one namely that the candidates are direct recruits and therefore, under the aforesaid Rules, they are required to clear the examination under Rule 3. By way of factual averment, an assertion has been made that in their respective appointment letters also, the appointees were informed that they will have to clear the examination. No such appointment letters are produced on record. It is difficult to understand how in the appointment letters issued before the promulgation of the Rules of the year 1976 in case of the candidates like the present petitioners, could there have been a reference to the requirement of their clearing the examination under Rule 3 of 1976 Rules and more particularly Rules 5 & 6 for having committed breach of requirement of Rule 3 namely clearing of examination.

13. An impression is created looking to the averments of some of the petitions particularly petition no.63 of 1997 that the petitioners are questioning the status of direct recruits. However, on close scrutiny and examination, they are also claiming the same thing as being done by the petitioners of the main petition and

other petitioners like him. The controversy is whether they are direct recruit under 1976 Rules. Obviously, they could not be treated as direct recruits under 1976 rules because they have been recruited prior to the promulgation of those Rules. Once they are accepted to be recruits prior to the promulgation of Rules, the rigour of Rule 3 read with Rules 5 & 6 obviously cannot apply to them and they will be out of the purview of those Rules and the requirement thereunder. Obviously, therefore, the impugned order of termination could not have been passed in case of any of these petitioners.

14. In passing, it may be mentioned that the approach of the respective DO calls for some comment. No doubt, in the affidavit in reply they have made a reference to the Government instructions issued in this regard and in the impugned order, reference has been made to Government letter dated 31-12-1996 as item no.2 where details of matters taken into consideration are given. First item, no doubt is the aforesaid Rules of 9-7-1976 and the second item is the aforesaid letter written by Section Officer in Panchayat and Rural Housing Department of Sachivalaya Gandhinagar dated 31-12-1996. The affidavit in reply clearly refers to the fact that action has been taken pursuant to the Government instructions. The situation created therefore is that the District Development Officers have brought about termination of candidate Mr. Bandari, who has been appointed in the year 1958 and was about to retire or may have retired by the time the order came to be passed and other candidates like him, without considering the implication of the Rules. It is on record that these various petitioners have been awarded promotions and some of them have risen to the post of TDO. Everything is set at naught by passing the impugned order of termination only because they did not comply with the requirement of Rule 3 of 1976 Rules. The Government does not seem to have taken into consideration the fact whether these Rules would apply to them or not and blindly following the Government instructions, the authorities at District level also have simply passed the impugned order.

15. It is quite clear that these Rules do not apply to them. The petitioners are direct recruits but not under the Rules of 1976. The requirement of their clearing the examination which is the foundation of the impugned order itself, therefore, is not available to the authority. The very foundation is thus in fact, knocked out of the impugned order. The basis having been knocked out of the impugned order, the impugned order must fail. The orders are , therefore, quashed and set aside. The

termination, if effected, will be of no effect. For all purposes the petitioners will be treated as continuing in service and the respective candidates on reaching the age of superannuation would get the consequential benefits without there being any break of service arising out of the impugned order. In case, they have not been paid for the break period that payment shall also be made at the rate of the pay they were entitled to at the respective dates.

16. After passing the aforesaid order as a common order in all the matters, some observations are required to be made and some directions are required to be issued in 3 of the matters i.e. SCAs 1707/97, 1199/97 both of Shri P.B.Majmudar and SCA No.1088 of 1997 filed by Mr.H.M.Parikh. In these matters, the respective petitioners are not served with termination orders. The result of the aforesaid finding is that their services cannot be terminated on account of the application of those Rules. The respondent authorities, therefore, shall not pass any termination order in their case by invoking the power under Rule 3 read with Rules 5 & 6 of the 1976 Rules.

17. Rule is made absolute accordingly with no order as to costs.
